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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

CSC-AGC 0000371

FILE: B-193355

DATE: May 14, 1979

MATTER OF: Bruno DiSimone [Request for Retroactive  
Temporary Promotion *With Backpay*]

DIGEST: Employee of Office of Workers' Compensation Programs, Department of Labor, claims a temporary promotion and backpay for detail to GS-14 or GS-15 position. He is entitled to retroactive temporary promotion to GS-13 and backpay from May 1, 1974, when he satisfied "Whitten Amendment" time-in-grade requirement for promotion until June 8, 1974, when he was promoted to GS-13 permanently. He is not entitled to higher pay thereafter since the Civil Service Commission determined that his position was properly classified at GS-13 and such determination is binding on administrative and accounting officers.

AGC 00365

Mr. Bruno DiSimone, an employee of the Office of Workers' Compensation Programs, Department of Labor, has appealed our Claims Division settlement of his claim for a retroactive promotion with backpay.

Effective June 30, 1973, Mr. Herman Adler retired as Deputy Commissioner, Office of Workers' Compensation Programs, Department of Labor, Baltimore, Maryland. At the time of his retirement, Mr. Adler was being compensated at the GS-15 level. On July 1, 1973, Mr. DiSimone, a Workmen's Compensation Claims Examiner, GS-12, was detailed to Mr. Adler's position. The claimant was paid at the GS-12 rate during his detail to the higher grade position. He was competitively promoted to Supervisory Workmen's Compensation Claims Examiner, GS-13, effective June 9, 1974.

While Mr. Adler was the incumbent the Labor Department decided to reclassify the Deputy Commissioner position due to amendments to the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act) by the Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251. Mr. Adler was permitted to retain his GS-15 salary during his incumbency. However, upon his retirement, the Deputy Commissioner position held by him was reclassified down on July 25, 1973, to Supervisory Workmen's Compensation Claims Examiner, GS-13. The incumbent of that position was to serve as Assistant Deputy Commissioner under the

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general direction of the Deputy Commissioner in the Philadelphia District Office. Mr. DiSimone possessed all requirements for the detailed job as provided for in the Civil Service Commission's (CSC) Handbook X-118, but did not have the required time-in-grade qualifications mandated by the "Whitten Amendment," 5 U.S.C. § 3101 note, until April 30, 1974.

Our Claims Division disallowed Mr. DiSimone's subsequent claim for retroactive temporary promotions to GS-14 and GS-15. However, it determined that he was entitled to a retroactive promotion to GS-13 on May 1, 1974, the date he fulfilled the "Whitten Amendment" eligibility requirements for promotion, to June 8, 1974, when he was promoted to Supervisory Workmen's Compensation Claims Examiner, GS-13, under competitive procedures. Mr. DiSimone appeals from our Claims Division settlement. He alleges that the Deputy Commissioner position was never downgraded. In support of his claim he states that he was authorized to act in the full capacity of Deputy Commissioner on July 17, 1974, and that he has acted in such capacity at all times. He also submitted evidence that the courts have held that the determination of attorneys' fees may not be made by Claims Examiners under the Longshoremen's Act but must be made by Deputy Commissioners. Upon review we sustain the settlement of our Claims Division for the reasons stated below.

In our Turner-Caldwell cases, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), we held that for purposes of the Back Pay Act, 5 U.S.C. § 5596, an agency has no authority, absent prior CSC approval, to detail an employee to a higher graded position beyond 120 days. Where an agency does not obtain such approval and keeps an employee on an overlong detail, the employee is deemed to have been temporarily promoted from the 121st day until he is returned to his regular duties. Such an employee is entitled to backpay for the period during which he was illegally detailed. It is necessary, however, that the employee satisfy the requirements for a retroactive temporary promotion. In this connection, certain statutory and regulatory requirements could affect the entitlement of an employee otherwise qualified for corrective action as a result of an improper extended detail. For example, an employee improperly detailed for an extended period, who fails to meet the time-in-grade requirements of the "Whitten Amendment," 5 U.S.C. § 3101, note, would not become entitled to a retroactive temporary promotion until such time-in-grade

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requirements were satisfied. See 55 Comp. Gen. 539, 543. Also, the position to which the individual is detailed must be an established one, classified under an occupational standard to a particular grade or pay level. Raymond F. Kennedy, B-185730, June 1, 1977. The issues in the instant case are whether Mr. DiSimone was qualified for temporary promotions on and after July 1, 1973, when he was assigned to perform higher grade duties, and whether there were higher grade positions to which he could have been promoted.

In the instant case the record indicates that Mr. DiSimone did not meet the time-in-grade requirements of the "Whitten Amendment," 5 U.S.C. § 3101 note, until May 1, 1974. Therefore, he was not eligible for a grade promotion for the period July 1, 1973, to May 1, 1974, and he is not entitled to backpay for that time regardless of the proper grade level classification for the job. Accordingly, backpay for a temporary promotion is limited to the period May 1, 1974, until his permanent promotion June 8, 1974. 55 Comp. Gen. 539, 543, supra. Also, since the detailed position was classified at GS-13, the claimant is entitled only to the additional payments for the temporary promotion at the GS-13 level.

Mr. DiSimone contends that the Deputy Commissioner position was never downgraded and claims that while classified as a GS-13, he was illegally detailed to the position of Deputy Commissioner, GS-15. The record shows that he was authorized to perform the acts of a Deputy Commissioner under the Longshoremen's Act and performed the duties of that position. Section 902, title 33, United States Code, defines the term "Deputy Commissioner" but does not indicate the salary or grade of that position. In this connection the record shows that in the GS-15 Position Description for Mr. Adler, Mr. DiSimone's predecessor, the position title was "Supervisory Workmen's Compensation Claims Examiner." The title "Deputy Commissioner" appears only in the part of the Position Description Form under the heading "Description of Duties and Responsibilities." Thus, it appears that the title "Deputy Commissioner" is a functional title rather than a position classification title. In this connection we point out that the grade of a particular position is dependent upon the nature and complexity of duties of the employee assigned to such position. See chapter 51, title 5, United States Code, and Altschul, B-192433, December 4, 1978. This Office does

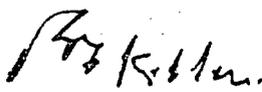
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not have jurisdiction to determine appropriateness of a classification action, that authority is solely within the jurisdiction of the agency and the CSC (now Office of Personnel Management). Edward Rothenberg, B-187234, December 8, 1976, and Thorne, B-182695, September 15, 1975.

Mr. DiSimone was authorized to act in the full capacity of Deputy Commissioner, but this alone does not necessarily constitute an illegal detail under our Turner-Caldwell decisions. The record shows that the GS-15 position of Mr. DiSimone's predecessor was cancelled and that Mr. DiSimone was appointed to a GS-13 position. If he believed his position was not correctly classified, his proper remedy was to seek to have the classification of his position upgraded. Rothenberg, supra. Mr. DiSimone appealed to the CSC and the agency's classification was upheld.

Under the provisions of 5 U.S.C. § 5107 agency classification actions are the basis for pay and personal transactions until changed by certificate of the CSC. Under the provisions of 5 U.S.C. § 5112 an employee may request the CSC to change his position from one class or grade to another and the CSC shall certify to the agency its action pursuant to such request. The agency shall act in accordance with the certificate, and the certificate is binding on all administrative, certifying, payroll, disbursing, and accounting officers. Accordingly, since the CSC has held that Mr. DiSimone's position was correctly classified at GS-13, we may not allow any claim for pay in excess of the pay for that grade.

In view of the foregoing, the Claims Division settlement was proper and is sustained.

  
Deputy Comptroller General  
of the United States